Supreme Court, U.S.
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No. 99-1709

In The

Supreme Court of the United States

JAMES A. McDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF THE CASE

Petitioner elides the facts that implicate him in criminal wrongdoing and that are central to this case, *see* Petition for a Writ of Certiorari ("Pet.") at 5 (omitting any discussion of McDermott's dissemination of the tape on January 9, 1997), and distorts the court of appeals' decision. Thus, a brief counterstatement of the case is necessary.

1. After illegally intercepting Representative Boehner's telephone conversation, John and Alice Martin met with Democratic Representative Karen Thurman of Florida to discuss the tape and the possibility of receiving immunity for their illegal conduct. Appendix to Petition for a Writ of Certiorari ("Pet. App.") 3a. At Representative Thurman's suggestion, the Martins personally delivered the tape on January 8, 1997 to Representative McDermott in his capacity as the ranking member of the House Ethics Committee. Pet. App. 3a. The Martins' cover letter that accompanied the tape put Representative McDermott on notice of its illegal provenance by stating that the tape contained "a conference call heard over a scanner." Pet. App. 3a. The letter also indicated that the Martins were under the impression that they would "be granted immunity." Pet. App. 3a. As Judge Randolph noted, this reference to a promise of immunity gives rise to an inference that the "transaction may have involved a *quid pro quo*" and that McDermott is the "obvious candidate" to have brokered this "illegal transaction." Pet. App. 23a.

The next day, Representative McDermott gave copies of the tape to the *New York Times*, the *Atlanta Journal-*

Constitution, and *Roll Call*. Pet. App. 3a. The following day, January 10, 1997, the *New York Times* ran a front-page story that included a verbatim transcript of a portion of the illegally intercepted conversation. The *Times* reported that it had received the tape from a "Democratic Congressman hostile to Mr. Gingrich [and who] insisted that he not be identified further." Pet. App. 6a. Thus, there can be little doubt that Representative McDermott himself distributed copies of the tape to the media.

Representative McDermott's distribution of the tape constituted a violation of the Rules of the House Committee on Standards of Official Conduct pursuant to which representative McDermott swore:

> I do solemnly swear (or affirm) that I will not disclose, to any person or entity outside the Committee on Standards of Official Conduct, any information received in the course of my service with the Committee, except as authorized by the Committee or in accordance with its rules.

Rules of the House Committee on Standards of Official Conduct 7, at 197; *see also* Rules of the House of Representatives X, cl. 4, § 698(E)(4) (same). In light of this violation, Representative McDermott resigned from the House Ethics Committee on January 13, 1997. *See* Pet. App. 3a.

Notwithstanding petitioner's unfounded suggestions to the contrary, the contents of the tape did not suggest apparent "official misconduct." Rather, as the court of appeals recited, "[t]he participants discussed strategy regarding an expected Ethics Subcommittee announcement of Gingrich's agreement to accept a reprimand and

to pay a fine in exchange for the committee's promise not to hold a hearing." Pet. App. 3a. Plainly, there is nothing improper about such a conversation.

2.a. The majority of the court of appeals squarely held that 18 U.S.C. § 2511(1)(c) (the "Act") is constitutional under the intermediate scrutiny standard.[1] Applying this Court's familiar test from *United States v. O'Brien*, 391 U.S. 367 (1968), the court of appeals held that the Act promotes "substantial governmental interest[s]" "unrelated to the suppression of free expression." Pet. App. 9a. The court reasoned that the Act promotes freedom of speech because disclosure of illegally intercepted conversations destroys the privacy of those conversations and inhibits candid exchanges. Pet. App. 9a. Moreover, the court observed that the government has a substantial interest in prohibiting both the interception and distribution of illegally intercepted communications, each of which has a distinct chilling effect on freedom of speech. Pet. App. 9a (citing *Gelbard v. United States*, 408 U.S. 41, 52 (1972)). The court noted that public dissemination of a private conversation compounds the initial harm of interception and directly infringes on the " 'freedom not to speak publicly.' " Pet. App. 10a (quoting *Harper & Row*,

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[1] Petitioner somewhat cryptically states that Judge Ginsburg "did not join Judge Randolph's reasoning" while acknowledging that Judge Ginsburg joined Judge Randolph's opinion as it applied intermediate scrutiny. *See* Pet. 9. Judge Ginsburg clearly stated, however, that he concluded that the Act survives intermediate scrutiny "for the reasons stated in the opinion for the Court." Pet. App. 29a. *See also* Pet. App. 32a ("I agree the statute passes [intermediate scrutiny] for the reasons given in the opinion for the Court at [8a-13a].").

Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (internal citations omitted).

Thus, the majority found that the Act's prohibition on distribution of illegally intercepted conversations served an important governmental interest in limiting the harm and chilling effect caused by involuntary disclosure of private speech. In addition, likening the Act's prohibition on dissemination to similar restrictions in dealing in stolen property or child pornography, the court stated that such restrictions play an important role in drying up the market for the illicit item. Pet. App. 12a (citing *Osborne v. Ohio*, 495 U.S. 103, 110 (1990); *New York v. Ferber*, 458 U.S. 747, 760 (1982)).

In light of these considerations, the majority concluded that the Act's incidental restriction on speech is "no greater than is essential to the furtherance of [the] interest" it seeks to advance. Pet. App. 12a. The court reasoned: "Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded." Pet. App. 12a. In short, the court found that both the prohibitions on interception and distribution of private conversations were necessary to achieve the government's substantial interest in promoting candid and open private conversations. Neither petitioner nor the dissenting judge challenged the finding that the Act satisfies intermediate scrutiny.

b. It is also common ground among all the members of the court below that this Court's decision in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), does not authorize strict scrutiny of the Act.

Judge Randolph set forth several reasons for rejecting petitioner's contention that the Act should be subject to strict scrutiny under *Florida Star*. As a threshold matter, the *Florida Star* opinion itself expressly stated that it was not extending its strict scrutiny principle to situations where, as here, " 'information has been acquired unlawfully . . . by a *source*.' " Pet. App. 16a (quoting *Florida Star*, 491 U.S. at 535 n.8 (emphasis added)). The court explained at length that petitioner's effort to avoid the plain language of the footnote was "thoroughly unconvincing." Pet. App. 17a; *see* Pet. App. 16a-22a. More generally, Judge Randolph noted several important differences between the Act and the statute at issue in *Florida Star*. First, the laws have different objectives. "The Florida statute sought to protect the privacy of rape victims" whereas the Act "seeks to protect the privacy of communications" and thereby promotes the right not to speak publicly. Pet. App. 15a-16a. Second, the information that the Florida statute shielded was already in the government's possession and thus release of the information was in the government's control. Pet. App. 16a. Third, the Florida statute was content-based as it was triggered only by the release of information relating to the identity of rape victims. Pet. App. 16a. Title III's restrictions apply regardless of the speaker or content of the speech. Fourth, there was no scienter requirement under the Florida statute, which imposed liability even when the newspaper had no inkling that the information it was disclosing was confidential. By contrast, the Act is triggered only where the original interception is illegal and the person charged with disclosing its contents knew, or should have known, of the illegality. Pet. App. 16a.

Judge Randolph also concluded that application of strict scrutiny to the Act was inappropriate because none of the considerations identified by the Supreme Court in *Florida Star* are present here. First, the information in *Florida Star* was " 'entrusted to the government,' " and thus there was a less drastic means than punishing truthful publication to guard against the dissemination of the relevant information. Pet. App. 22a (quoting 491 U.S. at 534). By contrast, the contents of Representative Boehner's private conversation were not "entrusted to the government." Pet. App. 22a. Second, unlike the newspaper in *Florida Star,* Representative McDermott did not lawfully obtain the information because "the Martins *and* McDermott gained their knowledge of the call only through illegal transactions." Pet. App. 23a (emphasis in original). Third, the Court in *Florida Star* had stated that " 'punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act.' " Pet. App. 22a (quoting 491 U.S. at 535). By way of contrast, the information that the Act protects is not "already publicly available." Moreover, the government's prohibition on dissemination of this confidential information is the least intrusive means of advancing the government's interest in confidentiality. Fourth, the Court in *Florida Star* was concerned that the Florida statute at issue would foster self-censorship among the media if they could be punished for publishing "information released, without qualification, by the government." 491 U.S. at 536. That concern is not implicated by the Act which limits liability to those, like Representative McDermott, who distribute communications

which they know to have been illegally intercepted. Given that none of the considerations that led the Court in *Florida Star* to apply strict scrutiny are present here, Judge Randolph concluded that the rule of *Florida Star* had no application to the Act.[2]

Judge Randolph also concluded that an extension of *Florida Star* was particularly unwarranted as it would contravene the *Florida Star* Court's repeated admonition that "our holding today is limited." *Florida Star*, 491 U.S. at 541. *See* Pet. App. 15a (citing 491 U.S. at 531 n.5, 532, 531). Moreover, petitioner's proposed reading of *Florida Star* would render that decision fundamentally inconsistent with several of this Court's precedents which have established the principle that statutes which prohibit the

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[2] Petitioner's suggestion that Judge Randolph "refused to apply strict scrutiny on the theory that this case is not about speech at all" is thus incorrect. *See* Pet. 8. Judge Randolph rejected application of *Florida Star* for the reasons cited above. As for Judge Randolph's discussion suggesting that Representative McDermott did not engage in "speech" by distributing copies of the tape, this portion of his opinion was not joined by Judge Ginsburg and thus does not reflect the views of the majority of the panel. Moreover, Judge Randolph himself proceeded " 'on the assumption that there was [some] communicative element' " in Representative McDermott's release of the tape. Pet. App. 7a (quoting *O'Brien*, 391 U.S. at 376). By applying *O'Brien*'s intermediate standard of scrutiny, Judge Randolph, joined by Judge Ginsburg, applied precisely the same level of scrutiny that would govern a content-neutral regulation of expression protected by the First Amendment. Thus Judge Randolph's suggestion that Representative McDermott's conduct might not be protected by the First Amendment at all did not influence the court below's disposition of this case.

disclosure of private or confidential information do not offend the First Amendment. *See* Pet. App. 24a-26a (citing, *e.g.*, *Harper & Row*, 471 U.S. at 555-60 (upholding prohibition on unauthorized publication of copyrighted material); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31, 36-37 (1984) (upholding protective order pertaining to disclosure of private information lawfully acquired by litigants)). Such prohibitions serve as an " 'engine of free expression' " by promoting exchanges of confidential information. Pet. App. 26a (quoting *Harper & Row*, 471 U.S. at 558).

Judge Ginsburg also rejected application of the rule of *Florida Star* in the instant case on the ground that Representative McDermott had not "lawfully obtained" the information he disclosed. He reasoned, "[o]ne who obtains information in an illegal transaction, with full knowledge that the transaction is illegal, has not 'lawfully obtain[ed]' that information in any meaningful sense." Pet. App. 30a. For this reason, Judge Ginsburg concluded *Florida Star* was inapposite.

Even Judge Sentelle in his dissent acknowledged that *Florida Star* reserved the issue presented by this case without deciding it. Pet. App. 40a. Judge Sentelle concluded that strict scrutiny should apply because "the statutes before us burden speech based on its content – that is they forbid its publication because it contains information obtained at an earlier time in an illicit fashion." Pet. App. 40a. As Judge Randolph explained, this is facially erroneous because the Act's protection is triggered irrespective of the content of the intercepted communication and would have applied equally to, for

example, a conversation by Mr. Boehner regarding mundane domestic matters. Pet. App. 27a. Presumably for this reason, petitioner has never disputed that the Act is strictly content-neutral.

c. On December 27, 1999, the Court of Appeals for the Third Circuit opined on the Act's constitutionality in *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), *petition for cert. filed* (U.S. Apr. 19, 2000) (99-1687), and *petition for cert. filed* (U.S. Apr. 27, 2000) (99-1728). That court also rejected the contention that strict scrutiny ought to be applied to the Act under *Florida Star*, for many of the same reasons outlined by Judge Randolph. *See* Appendix to the Petition for a Writ of Certiorari in *United States v. Vopper* (U.S. Apr. 27, 2000) (99-1728) ("*Vopper* Pet. App.") 13a-14a.

The Third Circuit found that the Act was content-neutral, and thus applied intermediate scrutiny. *Vopper* Pet. App. 27a-28a. The majority concluded that the Act did not satisfy intermediate scrutiny because the United States had not "offered" sufficient evidence to establish that the Act "promote[d] privacy by eliminating the demand for intercepted materials on the part of third parties." *Vopper* Pet. App. 33a. The majority reached its conclusions without any reference to this Court's decision in *New York v. Ferber*, 458 U.S. 747, 760 (1982) (upholding a prohibition on the distribution of child pornography on the ground that it would "dry up the market" for such products) and without acknowledging the host of other laws that are premised on a similar rationale. Likewise, the *Bartnicki* majority did not address Judge Randolph's

separate basis for upholding the Act; namely, that disclosure of an illegally intercepted conversation compounds and exacerbates the invasion of privacy caused by interception. Instead, the majority distinguished the result in *Boehner* on the grounds that Representative McDermott "was more than merely an innocent conduit" of the intercepted conversation because, unlike the private defendant in *Bartnicki*, he knew and worked with those who intercepted the conversation to disclose it. *Vopper* Pet. App. 40a.

DISCUSSION

Applying intermediate scrutiny under the First Amendment, the court of appeals upheld an act of Congress which rendered petitioner civilly liable for transmitting a tape of a private phone call which he knew was stolen and that he had directly received from those who had illegally taped it. Petitioner maintains that this Court's precedents, and fundamental First Amendment principles, require that the Act's content-neutral prohibition against disclosing someone else's illegally-obtained speech must be subjected to the same level of strict First Amendment scrutiny that would be applied to a content-based restriction prohibiting petitioner from engaging in his own speech. This is patently erroneous for a number of reasons, as the opinions below fully explained.[3]

[3] Content-neutral restrictions, such as the Act, are subject to the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), not the strict scrutiny applied to content-based prohibitions. *See City of Erie v. Pap's A.M.*, 120

Nevertheless, a recent decision by the Third Circuit held that the Act fails intermediate scrutiny and *certiorari* petitions in that case have been filed by both the United States and the private petitioner. *Bartnicki v. Vopper*, 200

S. Ct. 1382, 1391 (2000); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661 (1994); Petition for a Writ of Certiorari in *United States v. Vopper* (U.S. Apr. 27, 2000) (99-1728) 11-13; Pet. App. 7a. Moreover, pursuant to at most intermediate scrutiny, this Court has repeatedly upheld the imposition of civil sanctions on those who disclose the speech of others when they have acquired that speech either unlawfully or pursuant to a duty of nondisclosure. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (upholding civil damages award for the unauthorized disclosure of truthful copyrighted materials by a former President without any heightened First Amendment scrutiny); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (upholding, under intermediate scrutiny, prior restraint prohibiting a newspaper from disclosing truthful, publicly-important information it lawfully obtained through civil discovery); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (upholding civil damages award for news broadcast of publicly performed act without heightened First Amendment scrutiny); *United States v. Aguilar*, 515 U.S. 593 (1995) (upholding criminal penalty for disclosing truthful information about a legal wiretap). Pet. App. 24a, 26a. Here, the tape of respondent Boehner's private conversation did not "lawfully come into [petitioner's] hands" because it was unlawful for his sources to both acquire it and transmit it to petitioner and, in any event, petitioner only acquired the tape under the Act's straightforward duty of nondisclosure. *Aguilar*, 515 U.S. at 605. Contrary to petitioner's assertion, the line of cases culminating in *Florida Star* that applied strict scrutiny to content-based prohibitions against the publication of information provided by the government do not apply to content-neutral prohibitions against disclosing information which has both been unlawfully acquired and unlawfully transmitted to the defendant. *See supra* p. 6.

F.3d 109 (3d Cir. 1999), *petition for cert. filed, Bartnicki v. Vopper* (U.S. Apr. 19, 2000 (99-1687), and *petition for cert. filed, United States v. Vopper* (U.S. Apr. 27, 2000) (99-1728). For the reasons explained in those petitions, the Third Circuit's invalidation of the Act is both an erroneous application of intermediate scrutiny and in tension with the D.C. Circuit's decision here. Respondent concedes that the issue in this case is an important one and that the Third Circuit's approach in *Bartnicki* is inconsistent with the decision below. For the reasons outlined below, respondent respectfully submits that the Court should grant *certiorari* in both this case and *Bartnicki* and consolidate the cases for argument.

Granting review in this case would facilitate the full exploration of all the First Amendment issues implicated by the Act or similar measures prohibiting the disclosure of illegally obtained speech or information. First, the speech illegally intercepted here was a discussion among congressional leaders about important congressional business and thus is at the core of the speech protected by the First Amendment. Indeed, the Speech and Debate Clause of the Constitution guarantees the absolute confidentiality of this conversation against all efforts to seek its disclosure. *See Hutchinson v. Proxmire*, 443 U.S. 111 (1979). Petitioner asserts that the public importance of this speech somehow argues in favor of sanctioning its illicit, unauthorized disclosure under the First Amendment. This, of course, has it precisely backwards. The societal interest in avoiding the chilling effect of unauthorized disclosure is at its zenith when the speech being disclosed is internal deliberations among government leaders about important public affairs. This is the

reason such speech is given special protection against disclosure under the Speech and Debate Clause and "executive privilege" doctrines. *See, e.g., United States v. Nixon*, 418 U.S. 683, 705 (1974). If anything, then, illicit revelation of such speech is particularly disfavored and especially destructive of one's First Amendment "freedom *not* to speak publicly." *Harper & Row*, 471 U.S. at 559 (emphasis added). In any event, the fact that core political speech is at issue here makes this a particularly appropriate vehicle for resolving the First Amendment issues presented.

In addition, the person disclosing the illegally intercepted conversation here is a Member of Congress who concededly received the stolen tape "because of his position as ranking member of the House [Ethics] Committee," Joint Appendix, *Boehner v. McDermott*, No. 98-7156 (D.D.C.) 145. As such, like the federal judge in *Aguilar*, he is a "government official in [a] sensitive confidential position" and thus is subject to "special duties of nondisclosure." *Aguilar*, 515 U.S. at 605-06. Accordingly, review of this case, in conjunction with *Bartnicki*, would enable the Court to explicate the duties of nondisclosure that may permissibly be imposed on public officials, private citizens and media entities, to the extent they may differ.

Further, as the Third Circuit emphasized at length, petitioner McDermott, unlike the defendant in *Bartnicki* who received the tape from an unknown source, actively and directly participated in the illegal transaction by which the tape was given to him by those who illegally intercepted the conversation. *Vopper* Pet. App. 40a. While we believe that the Third Circuit erred in making this

distinction dispositive since the Act may constitutionally be applied to both those who receive an illegally intercepted conversation from an unknown source and those who directly conspire with the thief, granting review in this case would allow the Court to resolve this issue. Finally, this case involves two sitting members of Congress involved in a well-publicized public controversy and the opinions below thoroughly discuss the relevant constitutional considerations in a thoughtful and comprehensive manner.

CONCLUSION

For the foregoing reasons, respondent does not oppose *certiorari* and, if *certiorari* is granted in *Bartnicki*, believes that *certiorari* should be granted here and the cases should be consolidated for argument.

Respectfully submitted,

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